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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1125

CHARLES BERNSTEIN, etc.,
Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

DANIEL V. O'BRIEN
1250 Big Bend Boulevard
St. Louis, Missouri 63117
Attorney for Petitioner

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

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To the United States Court of Appeals for the Eighth Circuit

The petitioner, Charles Bernstein, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on January 6, 1975.

OPINIONS BELOW

No formal opinion was rendered by the District Court.

The opinion of the Court of Appeals has not yet been reported and is reproduced in Appendix A to this Petition.

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. 1254(1). (The relevant Court orders appear in Appendix B infra).

ISSUES PRESENTED

Petitioner was convicted of violating 18 U.S.C. 1952 (use of interstate facilities to carry on unlawful gambling activities) and conspiracy to violate that statute. The essence of the Government's case consisted of recorded telephone conversation obtained pursuant to Title 18, Section 2515-2518. Some of this surveillance material was edited by FBI agents on the basis of what they judged to be irrelevant. The role of the Attorney General (John Mitchell) in the authorization procedures was vague and uncertain at best. An evidentiary hearing to determine the nature and extent of that role was denied. The issues herein are:

I. Is it lawful for the monitoring government agents to selectively record on tapes only those portions of electronically intercepted telephone conversation which he personally judges to be relevant.

II. Does the discretionary editing of the tapes of wiretapped telephone conversations in violation of Title 18, Section 2518 (8)(a), render such evidence inadmissible?

III. If the edited tapes and the transcripts therefrom are admissible, is Petitioner thereby deprived of Due Process of Law and a fair trial pursuant to the requirements of the Fifth and Sixth Amendments to the Constitution?

IV. Is a defendant entitled to an evidentiary hearing to ascertain the particulars of the authorization procedure and the

time sequence of events, where it is clear that a court-ordered wiretap was obtained under vague and confusing circumstances?

V. Is a defendant foreclosed by *United States v. Chavez*, 416 U.S. 562, 40 L.Ed. 2d 380, to his right to an evidentiary hearing on the wiretap authorization procedure, where the Attorney General files a post-wiretap affidavit asserting his personal authorization of the wiretap, even though his original pre-wiretap memorandum designates an assistant Attorney General as the authorizing official?

VI. Can an Appellate Court dismiss as harmless error the use of evidence (a newspaper article) which it finds to be both erroneous and prejudicial and still assure the defendant the Due Process of Law and a fair trial?

STATUTES INVOLVED

Title 18, United States Code, Sections 1952, 2515, 2516, 2517, and 2518, set forth in Appendix (infra p. A-3).

STATEMENT OF FACTS

Petitioner was indicted with seven co-defendants in a multiple count indictment. All defendants were charged with conspiracy to violate Title 18, section 1952 (use of interstate facilities to conduct illegal gambling activities) and various combinations of defendants were charged with substantive violations of Section 1952. Petitioner was convicted of both substantive and conspiracy counts.

The crux of the Government's case consisted of intercepted telephone conversations obtained by FBI agents pursuant to a series of court orders based upon Title 18, United States Code, Sections 2515-2518. Thirty-six conversations were introduced into evidence in the form of tapes and typewritten transcripts.

A motion to suppress the wiretap evidence, based on improper authorization procedures allegedly employed by the Department of Justice, was filed when Petitioner's counsel learned that the authorization letter purportedly signed by Assistant Attorney General Will Wilson was not, in fact, signed or reviewed by that official (appendix below, pp. 77-79). In response to this motion, the government produced a memorandum from Attorney General Mitchell to Will Wilson advising Wilson that "you are specifically designated to exercise those powers" conferred by Title 18, Section 2516 (appendix below, p. 88). The government also produced an affidavit from Mitchell (Appendix below, p. 87) in which he alleges that he personally initialled the foregoing memorandum to Wilson, and that by the memorandum he really intended to advise Wilson that he, Mitchell, had personally authorized the wiretap application. Petitioner was unwilling to accept this somewhat confusing explanation, and filed a motion for an evidentiary hearing on his motion to suppress for the purpose of obtaining direct testimony from Mr. Mitchell concerning his role in the authorization procedure (Appendix below, pp. 80-81). This was denied (Appendix below, p. 84).

During the course of the trial itself, when FBI agents were called upon to describe the methods used in effecting the wiretaps, it was learned that some tapes and transcripts did not contain all of the conversations which were intercepted and overheard. The monitoring agent, who intercepted and overheard the entire conversation, would turn the recording mechanism off and on, so that he recorded only those portions of the conversations he personally judged to be relevant (R. 310-311). On one particular conversation, for example (Exhibit 31-B), the unrecorded gaps in the conversation were indicated in the transcript by the parenthetical phrase "(Private Conversation)." Similar gaps were later found in transcripts of conversations which were intercepted under this same order but not used in evidence in this trial (Appendix below, pp. 104-114).

Also during the course of the trial, the prosecution was permitted, over objections, to have its witness read to the jury a newspaper article concerning nation-wide gambling raids, containing among other things an assertion by the Attorney General that gambling is the "financial apparatus which bankrolls organized crime." (R. 264-265). Following the reading of the article, the trial court instructed the jury that the article "is not of itself evidence of the truth of any fact contained in the article" (R. 268).

In affirming the conviction of petitioner, the Eighth Circuit opinion asserted that the Supreme Court holding in *United States v. Chavez*, 416 U.S. 562, 40 L.Ed. 2d 380, foreclosed any right of petitioner for an evidentiary hearing to determine Attorney General Mitchell's role in the authorization procedure, although the author of the opinion below (Judge Heaney) personally favored such a hearing. (Appendix A, fn. 5, pp. A-5-6) In addition, the court below refused to consider the issue of editing and selective recording of the intercepted conversation on the grounds that it was not sufficiently raised in the trial court (Appendix A, p. A-10). On the matter of the newspaper article, the court below held that although the reading of the article was both improper and prejudicial, it was nevertheless "harmless" (Appendix A, pp. A-14-15).

REASONS FOR GRANTING THE WRIT

1. The instant record, manifesting deliberate actions by government agents to edit the tapes and transcripts of intercepted conversations, raises serious questions concerning the wiretap statutes, and particularly Section 2518(8)(a), which apparently have not been considered in any appeal prior to now. Section 2518(8)(a) (Appendix C, p. A-31) actually establishes two rules in regard to preservation of intercepted conversation:

(1) The contents of any intercepted conversation shall, if possible, be recorded.

(2) The recording shall be done so as to avoid editing. Both of these statutory mandates were admittedly violated here. Entire conversations were intercepted and monitored, but only portions were recorded, at the discretion of the monitoring FBI agents. This obviously resulted in edited tapes and transcripts, which contained only those parts of the conversations which the agent wanted them to obtain.

The appellate court refused to rule on this issue on the grounds it was not sufficiently raised in the trial court and oral argument below, never suggested such a defense to this point. In truth and in fact, the original motions to suppress filed before trial included the allegation that "the procedure for interception was invalid and unconstitutional" (Appendix below, p. 77). Moreover, the editing of the tapes and transcripts offered in evidence was not discovered or disclosed until the middle of the trial itself, when an FBI agent testified as to the meaning of the "private conversation" interjected in the transcript (R. 210-311); and when the tapes and transcripts were offered into evidence, all objections described in the motions to suppress were preserved by agreement of all counsel and the trial court (R. 1062). For these obvious reasons, the government did not at any time argue to the appellate court that the editing issue

was foreclosed from review, yet the Eighth Circuit, perhaps because of its unfamiliarity with the minute details of a long and complicated record, erroneously refused to consider the point.

In any event, this issue is much too important to be dismissed or disregarded on technical procedural grounds. It involves a deliberate and flagrant violation by the government of the clear mandate of the statute, in an area in which this nation has already had too much painful experience. If, indeed, the government was wrong in editing the tapes, and if it had not been so carefully preserved in the motions to suppress as explained above despite its unexpectedness, it is an error so plain and substantial that it cries out for recognition under Rule 52(b), Federal Rules of Criminal Procedure.

This issue thus far has not been raised or decided by any appellate court. It is one which requires immediate attention and resolution by the Supreme Court to prevent continued and widespread abuse of wiretap procedures. This Court is already aware, by virtue of the arguments in *United States v. Giordano*, 416 U.S. 505, 40 L. Ed. 341, and *United States v. Chavez*, 416 U.S. 562, 40 L. Ed. 2d 380, of the extensive use of wiretaps by the Department of Justice, and should act now to limit that use to the proper confines of the statute. In this regard, it should decide at once whether the editing tapes by selective recording, in violation of Section 2518(8)(a), makes the telephone conversation "unlawfully intercepted" within the meaning of Giordano, or is merely a non-substantive error similar to that in Chavez.

The mandate of Section 2518(8)(a) serves an obvious congressional purpose; the statutes of the United States must comport with the blessings of the Bill of Rights. This section was designed to prevent the unfairness inherent in editing procedures. Our concepts of Due Process and our motions of a fair trial require this.

It is clear from this record and the arguments below that the Department of Justice believes its wiretapping agents have the

right, at their discretion, to record and preserve only those portions of intercepted and monitored conversations which they deem to be relevant, and that therefore the preservation of any exculpatory matter in such conversations must depend solely upon the good faith of the agents operating the recording device. But it has now become alarmingly clear to this entire nation that misleading, self-serving, and distorted impression can be easily conveyed to a jury of twelve or to an entire populace from tapes and transcripts which are fragmentary or edited. The resolution of this obvious problem lies only with this Court.

2. The decision below, denying an evidentiary hearing to probe the true role of Attorney General Mitchell in the authorization procedures, expands the Chavez holding to an extent never anticipated or intended by this Court. To be sure, the authorization procedures here and in Chavez are similar: a memorandum from Mitchell to Assistant Attorney General Wilson, initialed by Mitchell, advises Wilson that "you are hereby specially designated" to exercise the powers conferred in Section 2516; later, after motions to suppress are filed, Mitchell submits an affidavit to the trial court averring that by that memorandum he really meant to indicate his personal approval of the wiretap. Mr. Justice White, writing for the majority in Chavez, specifically noted that the memorandum on its face "suggested that the decision whether to authorize the particular wiretap application would be made by Assistant Attorney General Wilson," 40 L. Ed. 2d at p. 288. However, because both the district court and appellate court assumed, without objection by defendant, that the Attorney General did in fact personally approve the wiretap, the apparent inconsistency between the Mitchell memorandum and his explanatory affidavit was disregarded. Chavez, therefore, was decided by this Court only on the issue as to misidentification of the authorizing official in the district court's wiretap order.

In the instant case, Judge Heaney, who authored the opinion below, indicated that he personally favored a remand for an evidentiary hearing to determine the true Mitchell role in the proceedings, but a majority of the court disagreed (Appendix A, fn. 5, pp. A-5-6). Similarly, in his concurring opinion in *United States v. Brick*, 502 F. 2d 219, 227, Judge Bright expressed his belief that such a hearing should be required. In each instance, however, the majority of each Eighth Circuit panel felt that a remand for such hearing was foreclosed by Chavez. The Fifth Circuit on the other hand, in a pre-Chavez opinion, specifically ordered a remand for such an evidentiary hearing to obtain the direct testimony of Mitchell, *United States v. Robinson*, 472 F. 2d 973.

A review by this Court is therefore in order to dispel the idea that Chavez intended to preclude a defendant's right to a full adversary hearing on a motion to suppress based on unlawful authorization procedures. At least two judges of the Eighth Circuit would insist on such a hearing, and perhaps the entire court below would agree, if they did not feel restrained by the Chavez holding. Certainly the matter should be settled now, before the Chavez opinion is allowed to become precedent for matters far beyond the anticipation of the five justices who constituted the majority therein.

The constitutional implications of this issue are at once obvious and a serious infringement on Sixth Amendment rights of confrontation could result if the holding below is permitted to stand. Here petitioner was faced, in reply to his motion to suppress, with a memorandum apparently initialed by the Attorney General plus an ex post facto affidavit which gives the memorandum an entirely different meaning than the plain wording therein. But petitioner is compelled to be bound by that affidavit, without the right to confront and cross-examine Mr. Mitchell to determine the reason for the inconsistency and the true role which he played in the sequence of events leading up

to the wiretap authorization. This restriction contravenes the historical and traditional guarantees of the Sixth Amendment, recently so well expressed by Mr. Justice Powell in *Chambers v. Mississippi*, 410 U. S. 284, 295:

> "The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the 'accuracy of the truth-determining process.' "

Moreover, if permitted to stand, the ruling below, with its misplaced reliance on Chavez, would provide all future prosecutors with a sure and simple method to avoid the consequences of *United States v. Giordano*, supra. Any motion to suppress wiretaps based upon improper authorization procedures and violation of Section 2516 could be summarily defeated by an ex post facto affidavit by the Attorney General (or any designated Assistant Attorney General) that he personally approved the wiretap, irrespective of the absence of written records in the Department of Justice reflecting such approval. The defendant, according to the opinion below, would be bound by that affidavit, foreclosed from an evidentiary hearing on the subject, and deprived of the right to cross-examine the affiant. Surely this Court did not intend for Chavez to have such far-reaching consequences and also forever insulate Attorneys General and Assistant Attorneys General from judicial examination and accountability as to wire-tapping procedures. Recent conduct by such high officials of the Department of Justice (while still bound by their oaths of office) would belie such an intent by this Court.

3. The opinion below introduces a new dimension to the "harmless error" doctrine set forth in Rule 52(a), Federal Rules of Criminal Procedures. In reviewing the introduction by the government of a newspaper article which brands bookmakers as the "financial apparatus which bankrolls organized crime," the Eighth Circuit conceded that such evidence was both im-

proper and prejudicial, yet dismissed the matter as harmless error (Appendix A, pp. A-14-15). Petitioner submits that if the error was admittedly prejudicial, it cannot conceivably be harmless. The principle of harmless error was developed to eliminate only those technical errors which do not affect the substantial rights of the parties, Title 28, U. S. Code, former Section 391. Former Section 556 of Title 18, in fact, the forerunner of Rule 52(a), defined disregardable defects as those "which shall not tend to the prejudice of the defendant." Here, then, where the improper evidence is found to be prejudicial, the disregard of same is an unprecedented extension of the harmless error doctrine which must be clarified to prevent future confusion in this important area.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit Court of Appeals.

Respectfully submitted

DANIEL V. O'BRIEN
1250 Big Bend Boulevard
St. Louis, Missouri 63117
Attorney for Petitioner